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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

JAMES A. FRY DBA FOX NETWORK )	CASE NO: 11-CV-1329 BTM POR
SYSTEMS; )	
Plaintiff) )	<b>AZTEC DOBERMAN PINSCHER</b>
v. )	<b>CLUB OF SAN DIEGO'S ANSWER</b>
AZTEC DOBERMAN PINSCHER )	<b>AND COUNTERCLAIM FOR</b>
CLUB OF SAN DIEGO )	<b>DECLARATORY JUDGMENT;</b>
Defendant) )	<b>INJUNCTIVE RELIEF; and DAMAGES</b>
_____ )	
)	<b>JURY TRIAL DEMANDED</b>
AZTEC DOBERMAN PINSCHER )	
CLUB OF SAN DIEGO, )	<b>Judge: Hon. Barry Ted Moskowitz</b>
Counterclaimant) )	
v. )	
JAMES A. FRY DBA FOX NETWORK )	
SYSTEMS; )	
Counter-Defendant) )	
_____ )	

**ANSWER and COUNTERCLAIM**

Defendant and Counterclaimant, AZTEC DOBERMAN PINSCHER CLUB OF SAN DIEGO, ("Aztec") through its attorney submits its Answer to the Complaint of Plaintiff, JAMES A. FRY DBA FOX NETWORK SYSTEMS, and its Counterclaim against JAMES

1 A. FRY DBA FOX NETWORK SYSTEMS on personal knowledge as to its own activities  
2 and information and belief as to the activities of others as follows:

3 **ANSWER**

4 **JURISDICTION**

5 1. This Court has original jurisdiction over this civil action pursuant to 28 U.S.C.  
6 § 1331(federal question) in that Plaintiff's cause of action arises under the federal Copyright  
7 Act, 17 U.S.C. § 101 *et. seq.*

8 **FEDERAL QUESTION JURISDICTION**

9 2. A district court has original jurisdiction over cases "arising under" federal law.  
10 28 U.S.C. §1331.

11 3. A case arises under federal law if it requires interpretation of the Copyright  
12 Act. *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 828 (2d Cir. 1964) ("an action 'arises under'  
13 the Copyright Act. . . if the complaint. . . assert a claim requiring construction of the Act.");  
14 *Gerig v. Krause Publ'n., Inc.*, 58 F. Supp. 2d 1261, 1267, 1267 n.5 (D. Kan. 1999).

15 4. In the Claim, Paragraph # 3, Plaintiff sets forth a claim for the "use of  
16 copyrighted images without permission". In the Claim, Plaintiff is attempting to exercise  
17 rights to control the use and distribution of certain copyrighted images under the theory that  
18 Plaintiff is the exclusive owner of the copyrights. 17 U.S.C. §§101 *et. seq.* and 201 *et. seq.*

19 5. The Copyright Act, Title 17 U.S.C. § 101 *et. seq.*, is the exclusive law  
20 regulating copyrighted materials including the rights to own, transfer or license such rights.  
21 Therefore, the Claim is exclusively a federal question.

22 **VENUE**

23 6. The United States District Court for the Southern District of California is  
24 proper because the Claim is a copyright action filed in San Diego County, California. 28  
25 U.S.C. §1400 (a), (b), and both Plaintiff and Aztec are residents in the Southern District of  
26 California.

27 ///

28 ///

**RESPONSE TO SPECIFIC ALLEGATIONS**

7. Answering Paragraph 1 of the Claim, Aztec is without sufficient knowledge or information to form a belief as to the truth of the allegations of the business entity and therefore denies such allegation; Aztec is informed and believes and on that basis admits the addresses listed for Plaintiff.

8. Answering Paragraph 2 of the Claim, Aztec admits the allegations.

9. Answering Paragraph 3 of the Claim, Aztec denies each and every allegation, except that Aztec admits that on or about March 7, 2011, Aztec received a notification from Plaintiff demanding that Aztec remove specific images from Aztec's website, but Aztec denies that Plaintiff had the right to make such demands.

10. Answering Paragraph 4 of the Claim, Aztec denies the allegations.

11. Answering Paragraph 5, Aztec denies that the court selected had jurisdiction over this matter.

12. Answering Paragraph 6 of the Claim, Aztec admits it does business in zip code 92101.

13. Answering Paragraph 7 of the Claim, Aztec admits the allegations.

14. Answering Paragraph 8 of the Claim, Aztec admits the allegations.

15. Answering Paragraphs 9, 10, and 11 of the Claim, Aztec is without sufficient knowledge or information to form a belief as to the truth of the allegations in these Paragraphs and therefore denies such allegations.

**AFFIRMATIVE DEFENSES**

16. As and for affirmative defenses to the claims in Plaintiff's original Complaint, Aztec alleges the following on personal knowledge as to its own activities and information and belief as to the activities of others as follows:

**FIRST AFFIRMATIVE DEFENSE**

17. Non-infringement. Aztec's alleged use of Plaintiff's copyrighted material is lawful based on the fact that Plaintiff does not have valid copyrights to the images and that Aztec is the rightful copyright owner of the images.

**SECOND AFFIRMATIVE DEFENSE**

18. Copyright registration. Aztec has submitted its copyright registration to the United States Copyright Office. The copyrightable portions of the Aztec website, *aztecdpc.com*, have been submitted for registration and are pending approval. Aztec is the original creator of the images, and entitled to copyright protection.

**THIRD AFFIRMATIVE DEFENSE**

19. Fraud. Plaintiff represented to Aztec that if Aztec provided him the images of Aztec's rescue dogs, the images would be used for the purpose of presenting the dogs through his website to the public in order to find homes for the dogs. Plaintiff's representation was false in that Plaintiff intended to also use the images of the dogs to entice unwary donors to make donations to him while they believed that they were making the donations to Aztec for the purpose of covering the costs of the direct care, housing, feeding, training and the medical needs of the dogs. Plaintiff knew that the representation was false when he made it, or he made the representation recklessly and without regard for its truth. Plaintiff intended that Aztec rely on the representation and Aztec reasonably relied on Plaintiff's representation in providing the images of Aztec's dogs to Plaintiff and would not allowed Plaintiff to display the images on his website had it known the truth. Aztec was harmed in that its images were commandeered and it did not receive all the donations that were intended for Aztec for the benefit of the dogs, and the public was confused and remains confused as to the distinction between Aztec and Plaintiff.

**FOURTH AFFIRMATIVE DEFENSE**

20. No license agreement exists. Claim for payment for permissive use of images for a fee would constitute a license agreement between Aztec and Plaintiff, and no such license agreement exists.

**FIFTH AFFIRMATIVE DEFENSE**

21. Insufficient originality. Claim for payment is based on copyright infringement and copyright licensing breach, which are claims that Plaintiff cannot maintain because they are based on original images owned by Aztec.

1 **SIXTH AFFIRMATIVE DEFENSE**

2 22. Unclean Hands. Plaintiff's initiation of this action is an attempt to extract  
3 payment based on rights to specific images that he does not own, further Plaintiff used the  
4 images of Aztec's rescue dogs to entice unsuspecting donors to give him money while such  
5 donors believed they were donating to Aztec.

6 **SEVENTH AFFIRMATIVE DEFENSE**

7 23. Waiver. Plaintiff intentionally relinquished any rights or control over any  
8 material, if he ever had any such copyrightable ownership, by acknowledging the work  
9 belonged to, and was done for, the benefit of Aztec at the time of creation.

10 **EIGHTH AFFIRMATIVE DEFENSE**

11 24. Complaint not in good faith. Claim is based on a frivolous argument alleging  
12 copyrights to images not owned by Plaintiff.

13 **NINTH AFFIRMATIVE DEFENSE**

14 25. Unjust enrichment. Plaintiff has profited by using Aztec's images in a fashion  
15 that he did not disclose, which was to entice unsuspecting donors to give him money while  
16 such donors believed they were donating to Aztec, and he collected an amount through such  
17 unauthorized in the amount of \$20,000, or an amount according to proof.

18 **TENTH AFFIRMATIVE DEFENSE**

19 26. Conversion. Plaintiff used the images of Aztec's rescue dogs in an  
20 unauthorized fashion to entice unsuspecting donors to give him money while such donors  
21 believed they were donating to Aztec.

22 **ELEVENTH AFFIRMATIVE DEFENSE**

23 27. Detrimental Reliance. Plaintiff represented to Aztec that if Aztec provided  
24 him the images of Aztec's rescue dogs, the images would be used for the purpose of  
25 presenting the dogs through his website to the public in order to find homes for the dogs.  
26 Plaintiff's representation was false in that Plaintiff intended to also use the images of the  
27 dogs to entice unwary donors to make donations to him while they believed that they were  
28 making the donations to Aztec for the purpose of covering the costs of the direct care,

1 housing, feeding, training and the medical needs of the dogs. Plaintiff knew that the  
 2 representation was false when he made it, or he made the representation recklessly and  
 3 without regard for its truth. Plaintiff intended that Aztec rely on the representation and  
 4 Aztec reasonably relied on Plaintiff's representation in providing the images of Aztec's dogs  
 5 to Plaintiff and would not allowed Plaintiff to display the images on his website had it  
 6 known the truth. Aztec was harmed in that its images were commandeered and it did not  
 7 receive all the donations that were intended for Aztec for the benefit of the dogs, and the  
 8 public was confused and remains confused as to the distinction between Aztec and Plaintiff.

#### 9 **TWELFTH AFFIRMATIVE DEFENSE**

10 28. Causation. No causation between Aztec's alleged acts and Plaintiff's damages.  
 11 Claim fails to specify a relationship between Aztec's alleged acts and authority for the  
 12 imposition of fees.

#### 13 **THIRTEENTH AFFIRMATIVE DEFENSE**

14 29. Estoppel. Plaintiff is estopped from claiming copyright to images of Aztec's  
 15 rescue dogs because the digital images of the dogs were provided to Plaintiff by Aztec  
 16 pursuant to Plaintiff's offer to display the dogs in order to find the dogs good homes.  
 17 Subsequently, Plaintiff deleted the digital images off of Aztec's camera's memory card.

#### 18 **FOURTEENTH AFFIRMATIVE DEFENSE**

19 30. No Relief. Plaintiff's Claim fails to state a claim upon which relief can be  
 20 granted. Claim makes no definitive reference to any laws or rights granting Plaintiff  
 21 copyright ownership or the right to impose fees or to license images to others, nor does he  
 22 allege any mutual agreement or license for Aztec's payment for such images, should he  
 23 have had copyrights to the images.

#### 24 **COUNTERCLAIM**

#### 25 **FEDERAL QUESTION JURISDICTION**

26 31. This Court is vested with subject matter jurisdiction pursuant to 28 U.S.C. §§  
 27 1331 and 1338(a) because this Counterclaim presents a civil action under the United States  
 28

1 Copyright Act. Aztec further seeks relief under 28 U.S.C. § 2201, 2202 (Declaratory  
2 Judgment Act).

### 3 VENUE

4 32. The United States District Court for the Southern District of California is  
5 proper because the Claim is a copyright action filed in San Diego County, California. 28  
6 U.S.C. §1400 (a), (b), and both Fry and Aztec have their principal place of business in the  
7 Southern District of California.

### 8 BACKGROUND

9 33. Plaintiff initially filed his Claim in California State Superior Court, County of  
10 San Diego claiming that Aztec owes him payment on Aztec's use of Aztec rescue dogs'  
11 images ("Aztec Rescue Images") on Aztec's website. However, the question of whether or  
12 not Plaintiff is the owner of the copyrights to Aztec Rescue Images is essential to Plaintiff's  
13 Claim. Plaintiff is claiming: (1) that Aztec is using Plaintiff's copyrighted images without  
14 his permission; and (2) that because of such non-permissive use, a breach of a licensing  
15 agreement has occurred and therefore Plaintiff is entitled to impose fees for use of the  
16 copyrighted images. 17 U.S.C. §§101 *et. seq.* and 201 *et. seq.*

17 34. Aztec denies that Plaintiff is the copyright owner of Aztec Rescue Images, and  
18 further denies that there is any licensing agreement. Therefore Plaintiff will need to prove  
19 that he owns the copyrights to Aztec Rescue Images or that he owns the right to license such  
20 copyrighted images. Further, he must prove that a licensing agreement in fact exists  
21 between Plaintiff and Aztec pursuant to which Aztec would owe fees to Plaintiff for the use  
22 of Aztec Rescue Images.

23 35. The Copyright Act, Title 17 U.S.C. § 101 *et. seq.*, is the exclusive law  
24 regulating copyrighted materials including the rights to own, transfer or license such rights.

25 36. Under 17 U.S.C. § 411(a), registration of a copyright is a prerequisite to  
26 bringing an infringement suit. Further, "receipt by the Copyright Office of a complete  
27 application satisfies the registration requirement of § 411(a)." *Cosmetic Ideas, Inc. v.*  
28 *IAC/Interactivecorp*, 606 F.3d 612 (9th Cir. 2010).



1           37. On or about June 14, 2011, Aztec submitted an application for copyright  
2 registration of various images that are on the Aztec website (*www.aztecdpc.com*), and is  
3 currently awaiting registration [claim# 1-622320731]. The images submitted for  
4 registration include the Aztec Rescue Images that are the subject of Plaintiff's Claim and the  
5 image of Aztec's logo (hereinafter the "Aztec Logo"), which is the Doberman superimposed  
6 in front of an image of an ancient sun disc/calendar. Attached hereto as **Exhibit A** are true  
7 and correct copies of the images Aztec submitted for registration. Therefore, Aztec has  
8 standing to bring this Counterclaim under 17 U.S.C. § 411(a).

9           38. On or about April 22, 2011, a different trial was held in the Superior Court of  
10 California, County of San Diego pursuant to a lawsuit brought by Plaintiff against Aztec  
11 claiming payment was owed to Plaintiff for, among other things, Aztec's use of the Aztec  
12 Logo (Superior Court Case No. 37-2011-00001022-SC-SC-CTL). In that case, the court  
13 returned a judgment in favor of Aztec as defendants finding that Plaintiff did not own the  
14 rights to the Aztec Logo.

15           39. Soon after the court entered the judgment against Plaintiff, James A. Fry  
16 began displaying an image of the Aztec Logo on the website he controls and which he uses  
17 as a fictitious business name: DobermanResQ.com, and he, under the fictitious business  
18 name of Fox Network Solutions, filed this instant Claim in California Superior Court.  
19 Thereafter, as described above, Aztec registered the Aztec Rescue Images that are the  
20 subject matter of Plaintiff's Claim, as well as the image of the Aztec Logo (hereinafter, the  
21 Aztec Rescue Images and Aztec Logo are together referred to as the "Aztec Images.")

22           40. Aztec believes that it is the rightful copyright owner of all the Aztec Images  
23 created by or for Aztec.

24           41. The Aztec Rescue Images at issue in this case were created by the then  
25 chairperson of the Aztec Doberman Rescue program, an established and recognized  
26 program of Aztec.

27           42. In the course of carrying out the duties of the chairperson of Aztec's  
28 Doberman Rescue, the chairperson takes photographs of the dogs that are taken into Aztec's



1 rescue program. Aztec then uses these photographs to promote the dogs for adoption. Thus,  
2 the photographs are taken of Aztec-owned dogs, by Aztec Doberman Rescue committee  
3 members, using Aztec's camera, at Aztec authorized kennels. These rescue images are  
4 fixed in a tangible medium of expression sufficiently permanent or stable to permit the work  
5 to be perceived, reproduced, or otherwise communicated for more than a transitory duration.  
6 In this case, all the Aztec Rescue Images are digital files initially stored on the camera  
7 memory card, and then transferred to a computer drive for display on the Aztec website and  
8 other websites.

9 43. Thus, Aztec is the rightful owner of the Aztec Rescue Images as the original  
10 creator through a work-for-hire relationship between Aztec and the chairperson and  
11 committee members of the Aztec Doberman Rescue program.

12 44. The Aztec Logo is merely a derivative work based on a similar logo (the  
13 Doberman superimposed in front of an image of an ancient sun disc/calendar) that Aztec has  
14 used for over 25 years. The logo was modified in or about 2003 to its current form.  
15 Pursuant to the separate lawsuit filed by Plaintiff against Aztec as described above, the  
16 Superior Court of California has ruled that Aztec is the owner of the Aztec Logo. As  
17 described above, Aztec has filed for registration of the image of the Aztec Logo.

18 45. Thus, Aztec brings this Counterclaim based on its claim of copyright  
19 ownership of the Aztec Images.

20 46. Aztec is informed and believes that James A. Fry is a member, director and  
21 officer of DOBERMANRESQ INC. and is the person who dominates and controls  
22 DOBERMANRESQ INC. James A. Fry DBA FOX NETWORK SYSTEMS and JAMES  
23 A. FRY DBA DOBERMANRESQ.COM, and DOBERMANRESQ INC., hereinafter  
24 referred to as the "Fry Entities," and James A. Fry, the individual, are each and all liable for  
25 the acts of the others as alleged in this Counterclaim as the alter egos of each other.  
26 Recognition of the privilege of separate existence would promote injustice because James  
27 A. Fry dominated and controlled the Fry Entities, and Aztec is informed and believes and on  
28 that basis alleges, that James A. Fry and the Fry Entities failed to comply with required legal

1 formalities in their business dealings, comingled funds and other assets between themselves,  
 2 did not conduct business with each other through arms-length transactions, and treated the  
 3 assets, income and liabilities of each other as their own. Further, Aztec is informed and  
 4 believes, and on that basis, alleges that James A. Fry has created DOBERMANRESQ INC.  
 5 merely as a shield against personal liability. Because of these actions, among others, there  
 6 exists, and at all times mentioned herein there existed, a unity of interest and ownership  
 7 between James A. Fry and the Fry Entities so that any individuality and separateness  
 8 between them has ceased. Adherence to the fiction of the separate existence of the Fry  
 9 Entities as entities distinct from James A. Fry and as to each other, would permit abuse of  
 10 the corporate privilege, would produce an inequitable result, and would produce an  
 11 injustice.

12 47. Hereinafter, James A. Fry, the individual and James A. Fry dba FOX  
 13 NETWORK SYSTEMS and dba DOBERMANRESQ.COM, plus DOBERMANRESQ  
 14 INC. will together be referred to as “Fry.”

### 15 **FIRST CLAIM FOR RELIEF**

#### 16 **(Declaratory Judgment of Copyright Ownership)**

17 48. Aztec incorporates by this reference each and every allegation set forth in the  
 18 other paragraphs set forth herein.

19 49. Aztec’s First Claim for Relief is brought under 28 U.S.C. § 2201, 2202  
 20 (Declaratory Judgment Act). An actual controversy exists between Aztec and Plaintiff over  
 21 the ownership of the Aztec Images. Plaintiff has twice filed suit in State court in essence  
 22 claiming that he has a right to extract fees from Aztec for Aztec’s use of the Aztec Images.  
 23 Further, though the parties never agreed to a license arrangement, Plaintiff claims that  
 24 Aztec’s continued use of the Aztec Rescue Images implied a license under which he can  
 25 charge Aztec whatever rates he chooses.

26 50. Plaintiff has twice invoked the Digital Millennium Copyright Act (“DMCA”)  
 27 take-down notice to the Aztec website hosting company, stating that Plaintiff is the rightful  
 28 copyright owner of the Aztec Images.

1           51. Plaintiff claims he is the rightful copyright owner of the Aztec Rescue Images  
2 because, after offering to display the photos of Aztec's rescue dogs to help promote them to  
3 find good homes, James A. Fry was supplied with the original digital photographic files of  
4 Aztec's rescue dogs. James A. Fry then performed minor modifications (cropping and/or  
5 altering their size) to the original photographs and placed the Aztec Rescue Images on a  
6 commercial website owned and controlled by James A. Fry under the guise of assisting the  
7 Aztec rescue program and its chairperson in finding homes for Aztec-owned rescue dogs.

8           52. As described above, Aztec is the rightful owner of the Aztec Rescue Images as  
9 the original creator through a work-for-hire relationship between Aztec and the chairperson  
10 and committee members of the Aztec Doberman Rescue program.

11           53. The Aztec Logo is merely a derivative work based on a similar logo (the  
12 Doberman superimposed in front of an image of an ancient sun disc/calendar) that Aztec has  
13 used for over 25 years. The logo was modified in or about 2003 to its current form.  
14 Pursuant to the separate lawsuit filed by Plaintiff against Aztec as described above, the  
15 Superior Court of California has ruled that Aztec is the owner of the Aztec Logo. As  
16 described above, Aztec has filed for registration of the image of the Aztec Logo.

17           54. Thus, Aztec is entitled to declaratory judgment that Aztec is the copyright  
18 owner of the Aztec Images, and any other such relief as may be appropriate including  
19 injunctive relief, costs and reasonable attorney's fees and sanctions against Fry.

## 20                                   **SECOND CLAIM FOR RELIEF**

### 21                                   **(Declaratory Judgment that no licensing agreement exists)**

22           55. Aztec incorporates by this reference each and every allegation set forth in the  
23 other paragraphs set forth herein.

24           56. Aztec's Fourth Claim for Relief is brought under 28 U.S.C. § 2201, 2202  
25 (Declaratory Judgment Act). An actual controversy now exists between Aztec and Plaintiff  
26 over the existence of a licensing agreement for copyrighted images. The Claim is based on  
27 Plaintiff's belief that he is the rightful owner of copyrights to Aztec Rescue Images, that he  
28 can impose fees or restrictions on the use of the Aztec Rescue Images under a license

1 arrangement. The Claim is seeking payment for Aztec's non-permissive continued use of  
2 the Aztec Rescue Images based on breach of this license agreement.

3 57. Plaintiff does not have the rights to any licensing, leasing or authority to  
4 control or restrict the use of the Aztec Rescue Images because, as described above, Aztec is  
5 the rightful copyright owner of such images.

6 58. Aztec is entitled to declaratory judgment finding that no such license exists in  
7 favor of Plaintiff for the Aztec Rescue Images, and that Aztec is not subject to the terms and  
8 conditions of any license, plus any relief as may be appropriate including injunctive relief,  
9 costs and attorneys and sanctions against Plaintiff.

### 10 **THIRD CLAIM FOR RELIEF**

#### 11 **(Declaratory Judgment that federal law supersedes State law in copyright licensing)**

12 59. Aztec incorporates by this reference each and every allegation set forth in the  
13 other paragraphs set forth herein.

14 60. Aztec's Third Claim for Relief is brought under 28 U.S.C. § 2201, 2202  
15 (Declaratory Judgment Act). An actual controversy now exists between Aztec and Plaintiff  
16 over the copyright ownership of the AZTEC RESCUE IMAGES and the existence of a  
17 licensing agreement by Plaintiff and its enforceability against Aztec.

18 61. Aztec is the rightful owner of the copyrighted images and no licensing  
19 agreement was ever reached between Aztec and Plaintiff and for these reasons no licensing  
20 agreement exists or can exist between Plaintiff and Aztec.

21 62. However, if the Court finds there is a licensing agreement as alleged by  
22 Plaintiff, Federal law supersedes State law regarding copyright licensing agreements due to  
23 the fact that a license agreement as imposed by Plaintiff, if any, had no explicit termination  
24 date when implemented and is not terminable at will. 17 U.S.C. §203(a)(3).

25 63. Therefore, Aztec is entitled to declaratory judgment determining that Federal  
26 law supersedes state law should it be found that a licensing agreement without a definite  
27 terminate date does exist between Plaintiff and Aztec.

28 ///

**FOURTH CLAIM FOR RELIEF**

**(Declaratory Judgment for Non-Infringement of Copyrights)**

64. Aztec incorporates by this reference each and every allegation set forth in the other paragraphs set forth herein.

65. Aztec's Fourth Claim for Relief is brought under 28 U.S.C. § 2201, 2202 (Declaratory Judgment Act). An actual controversy now exists between Aztec and Plaintiff over whether Aztec's use of the Aztec Rescue Images constitutes infringement. Plaintiff's Claim is based on allegations that Plaintiff is the copyright owner of the Aztec Rescue Images and that Aztec has infringed on these rights.

66. Aztec did nothing improper regarding use of copyrighted images, and believes that Aztec is the rightful owner. Therefore, as described above, Aztec cannot have infringed on the copyrights of Plaintiff for copying and displaying these images.

67. Thus, Aztec is entitled to declaratory judgment finding that no infringement by Aztec occurred, and any such relief as may be appropriate including injunctive relief, costs and reasonable attorney's fees and sanctions against Plaintiff.

**FIFTH CLAIM FOR RELIEF**

**(Injunctive Relief to Prevent Abuse of the DMCA)**

68. Aztec incorporates by this reference each and every allegation set forth in the other paragraphs set forth herein.

69. Plaintiff has twice invoked 17 U.S.C. §512(c)(3)(A), the Digital Millennium Copyright Act ("DMCA") to take-down notices against Aztec's website hosting company to force Aztec to first take down its entire website and then remove the Aztec Logo and Aztec Rescue Images from Aztec's website. Plaintiff invoked the DMCA take-down though he knew, each time, that he would not be filing an infringement suit in District Court in order to continue enforcement of the take-down after the 10-14 day initial take-down period. For the second take-down, Plaintiff included the Aztec Logo, which had already been determined to be owned by Aztec in Plaintiff's previous California Superior Court small claims case.

70. For the second take-down, Plaintiff misrepresented to Aztec’s website hosting company that he had, in fact, filed the required infringement lawsuit in order to keep the Aztec Logo and Aztec Rescue Images from being displayed on Aztec’s website. But, the “infringement lawsuit” was merely Plaintiff’s second small claims lawsuit, which did not even include the Aztec Logo.

71. Plaintiff's actions were in bad faith and retaliatory in nature and for the purpose of harassment and disruption of the operations of Aztec. By causing the website to be removed or disabled, Aztec will be deprived of its ability to perform the necessary functions vital to its charitable purpose.

72. Unless injunctive relief is granted against Fry as requested herein, Fry will continue to harass and disrupt Aztec's ability to serve the community with its charitable activities and he will continue to engage in an ongoing campaign of piecemeal legal action against Aztec by abusing the copyright laws.

73. Therefore, Aztec is entitled to an order granting a temporary and final injunction against enjoining Fry from using the DMCA to take-down Aztec's website and images based on Aztec's website's display of the Aztec Images.

## SIXTH CLAIM FOR RELIEF

**(Copyright infringement)**

74. Aztec incorporates by this reference each and every allegation set forth in the other paragraphs set forth herein.

75. Aztec is the owner of the copyrights to the Aztec Images, as described above as original works of authorship, and, as such, the Aztec Images constitute copyrightable subject matter under the copyright laws of the United States. The Aztec Images were automatically subject to copyright protection under 17 U.S.C. § 102(a) when such materials were fixed in a tangible medium of expression. Copyright protection under 17 U.S.C. §§ 102 and 103 extends to derivative works. Derivative works are defined in 17 U.S.C. § 101 to include works based on the original work or any other form in which the original work may be recast, transformed modified, or adapted.

1           76. The Aztec Images as submitted for registration to the United States Copyright  
2 Office are derivative works created from the original works only because Plaintiff has the  
3 original digital photos and image files in his possession and exclusive control.

4           77. Aztec is informed and believes and on that basis alleges that these are the only  
5 image files in existence, and that Plaintiff may destroy or has destroyed the original files.

6           78. Parts or all of the Aztec Images have been, and are continuing to be, copied or  
7 otherwise improperly reproduced and used by Fry without the permission of Aztec. Fry has  
8 infringed and will continue to infringe Aztec's copyright in and relating to the Aztec Images  
9 by using, copying, modifying, and/or distributing parts of the Aztec Images, or derivative  
10 works based on the Aztec Images, in connection with its activities related to Fry's website  
11 *DobermanResQ.com*, and other uses unknown to Aztec, but inconsistent with Aztec's  
12 exclusive rights under the Copyright Act.

13           79. Fry has infringed on the Aztec Images by, among other things,:

- 14           1) Seeking payment for the use of the Aztec Images and then attempting to  
15           enforce payment through State court action;
- 16           2) Restricting Aztec's use the Aztec Images from by physically preventing  
17           Aztec the rightful use of the Aztec Images;
- 18           3) Displaying the Aztec Images in a context that damages and causes harm to  
19           Aztec's reputation, causes confusion and deception to the public, and is  
20           done without Aztec's consent;
- 21           4) Incorporating the Aztec Images into graphic elements on Fry's commercial  
22           website without Aztec's consent;
- 23           5) Using the Aztec Images to misrepresent to the public that Aztec's decades  
24           of rescue work is Fry's own work in order to entice donors to give money  
25           to Fry; and
- 26           6) Using the Aztec Images to convince potential donors that money sent to  
27           Fry will be used to directly to house, feed, train and provide medical care  
28           to rescue dogs.



1 80. Fry's conduct was and is willfully done with knowledge of Aztec's copyrights.

2 81. Defendant Aztec has no adequate remedy at law. Fry's conduct has caused,  
3 and if not enjoined, will continue to cause, irreparable harm to Aztec.

4 82. As a result of Fry's infringement, Aztec is entitled to the following relief:

- 5 1) An order, pursuant to 17 U.S.C. § 502, granting a temporary and final  
6 injunction to prevent or restrain Fry from engaging in infringing activity  
7 related to the Aztec Images in any medium whatsoever including on any  
8 service provider system or network;  
9 2) An order for Fry to return to Aztec the original graphics files, as well as all  
10 copies and derivative works, of the Aztec Images;  
11 3) Actual damages in the amount of the donations Fry received during the  
12 time Fry displayed the Aztec Images (17 U.S.C. § 504), which is at least  
13 \$20,000 or an amount according to proof; and  
14 4) Penalties, punitive, attorney fees and costs against Fry as allowed by law.

15 **JURY TRIAL DEMAND**

16 83. Aztec asserts its rights under the Seventh Amendment to the U.S. Constitution  
17 and demands, in accordance with the Federal Rules of Civil Procedure 38, a trial by jury on  
18 all issues.

19 **PRAYER**

20 **WHEREFORE**, Defendant Aztec respectfully requests that the Court enter  
21 judgment for Aztec as follows:

- 22 1. That Plaintiff take nothing by his Claim;  
23 2. That Plaintiff's Claim, and all counts against Aztec, be dismissed with  
24 prejudice;  
25 3. That Aztec be awarded all costs, attorney fees, and expenses to the extent it  
26 incurred such costs, fees and expenses defending Plaintiff's Claims if  
27 Plaintiff's Claim is found to have not been brought in good faith;  
28 4. Declaratory judgment that Aztec is the copyright owner of the Aztec Images;

- 1           5.     Declaratory judgment finding that no such license exists in favor of Plaintiff
- 2                 for the Aztec Rescue Images, and that Aztec is not subject to the terms and
- 3                 conditions of any license;
- 4           6.     Declaratory judgment that federal law supersedes state law should it be found
- 5                 that a licensing agreement without a definite terminate date does exist between
- 6                 Plaintiff and Aztec;
- 7           7.     Declaratory judgment finding that no infringement by Aztec occurred;
- 8           8.     An order granting a temporary and final injunction enjoining Plaintiff from
- 9                 using the DMCA to take-down Aztec's website and images based on Aztec's
- 10                website's display of the Aztec Images;
- 11           9.     An order, pursuant to 17 U.S.C. § 502, granting a temporary and final
- 12                 injunction to prevent or restrain Plaintiff from engaging in infringing activity
- 13                 related to the Aztec Images in any medium whatsoever including on any
- 14                 service provider system or network;
- 15           10.    An order for Plaintiff to return to Aztec the original graphics files, as well as
- 16                 all copies and derivative works, of the Aztec Images;
- 17           11.    Actual damages in the amount of the donations Plaintiff received during the
- 18                 time Plaintiff displayed the Aztec Images (17 U.S.C. § 504), which is at least
- 19                 \$20,000, or an amount according to proof;
- 20           12.    Penalties and punitive damages in favor of Aztec against Plaintiff as allowed
- 21                 by law;
- 22           13.    Attorneys fees and costs in favor of Aztec against Plaintiff as allowed by law;
- 23           14.    Such other further relief to which Aztec may be entitled as a matter of law or
- 24                 equity, or which the Court determines to be just and proper.

25           Dated: July 1, 2011.

SCHOLEFIELD, P.C.

26                                 s/ Pamela J. Scholefield  
27                                 Pamela J. Scholefield  
28                                 Attorney for Defendant and  
                                      Counterclaimant Aztec Doberman Pinscher  
                                      Club of San Diego